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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT SEATTLE

9 NICHOLAS W. ,

10                   Plaintiff,

11                   v.

12                   COMMISSIONER OF SOCIAL SECURITY,

13                   Defendant.

14                   Case No. C21-5085-SKV

15                   ORDER REVERSING THE  
16                   COMMISSIONER'S DECISION

17                   Plaintiff seeks review of the denial of his application for Disability Insurance Benefits.

18                   Having considered the ALJ's decision, the administrative record (AR), and all memoranda of  
19                   record, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the case for  
20                   further administrative proceedings.

21                   **BACKGROUND**

22                   Plaintiff was born in 1984; has a high school diploma and additional vocational training;  
23                   and has worked as a rideshare driver, courier, shipyard labor coordinator, Army petroleum  
24                   specialist, and security guard. AR 44-50, 190-91. Plaintiff was last gainfully employed in 2020.  
25                   AR 50.

26                   In September 2018, Plaintiff applied for benefits, alleging disability as of September 15,

1 2017.<sup>1</sup> AR 157-61. Plaintiff's application was denied initially and on reconsideration, and  
2 Plaintiff requested a hearing. AR 100-02, 106-08, 112-13. After the ALJ conducted a hearing in  
3 June 2020 (AR 35-77), the ALJ issued a decision finding Plaintiff not disabled. AR 15-29.

4 **THE ALJ'S DECISION**

5 Utilizing the five-step disability evaluation process,<sup>2</sup> the ALJ found:

6 **Step one:** Plaintiff has not engaged in substantial gainful activity between his alleged  
onset date and his date last insured ("DLI") of December 31, 2017.

7 **Step two:** Through the DLI, Plaintiff had the following severe impairments: avascular  
necrosis and posttraumatic osteoarthritis of the left hip, status-post replacement; lumbar  
degenerative disc disease; left knee abnormality; posttraumatic stress disorder ("PTSD");  
and major depressive disorder.

10 **Step three:** Through the DLI, these impairments did not meet or equal the requirements  
of a listed impairment.<sup>3</sup>

11 **Residual Functional Capacity ("RFC"):** Through the DLI, Plaintiff could perform  
sedentary work with additional limitations: he could frequently climb ramps and stairs,  
but could never climb ladders, ropes, and scaffolds. He could frequently balance and  
occasionally stoop, kneel, crouch, and crawl. He could not work with conveyor belt-  
paced production requirements. He could perform work with standard work breaks.

14 **Step four:** Through the DLI, Plaintiff could not perform past relevant work.

16 **Step five:** As there are jobs that exist in significant numbers in the national economy that  
Plaintiff could have performed through the DLI, Plaintiff was not disabled through his  
DLI.

18 AR 15-29.

19 The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the  
20 Commissioner's final decision. AR 1-6. Plaintiff appealed the final decision of the  
21 Commissioner to this Court. Dkt. 1.

23 <sup>1</sup> Plaintiff amended his alleged onset date to October 20, 2016. AR 15, 171.

<sup>2</sup> 20 C.F.R. § 404.1520.

<sup>3</sup> 20 C.F.R. Part 404, Subpart P, App. 1.

## **LEGAL STANDARDS**

Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of social security benefits when the ALJ’s findings are based on harmful legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a general principle, an ALJ’s error may be deemed harmless where it is “inconsequential to the ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to “the record as a whole to determine whether the error alters the outcome of the case.” *Id.*

Substantial evidence is “more than a mere scintilla. It means - and means only - such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (cleaned up); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for evaluating symptom testimony, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that must be upheld. *Id.*

## DISCUSSION

Plaintiff argues the ALJ erred in assessing certain medical opinions written by examining psychologists, and in discounting his allegations of disabling mental limitations.<sup>4</sup> The

<sup>4</sup> For the first time on reply, Plaintiff also challenges the terms of the Commissioner's appointment. Dkt. 16 at 1-4. Because this case must be remanded on other grounds, as explained herein, the Court need not address this issue.

1 Commissioner argues the ALJ's decision is free of harmful legal error, supported by substantial  
2 evidence, and should be affirmed.

#### **A. The ALJ Did Not Harmfully Err in Discounting Plaintiff's Mental Allegations**

The ALJ summarized Plaintiff's physical and mental allegations and explained that he discounted them because (1) the objective evidence fails to corroborate the extent of his alleged hip disorders; (2) his back problems were treated only conservatively and the record contains few abnormal findings related to his back; (3) the record does not corroborate Plaintiff's alleged knee problems before the DLI; (4) Plaintiff received no consistent mental health treatment during the adjudicated period, and his treatment notes contain normal mental findings as well as his denial of mental symptoms; and (5) his activities (working, interacting with others as a rideshare driver, caring for himself and his children) are also inconsistent with his alleged physical and mental limitations. AR 21-24. In the Ninth Circuit, an ALJ's reasons to discount a claimant's allegations must be clear and convincing. See *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

Plaintiff does not challenge the ALJ’s assessment of his physical allegations, but argues  
that the ALJ erred in discounting his mental allegations. Dkt. 11 at 11-13. Plaintiff argues that  
although the ALJ found his work activity to be inconsistent with his mental allegations, his work  
during the adjudicated period did not constitute substantial gainful activity and he eventually had  
to stop his driving job due to his pain medications. Dkt. 11 at 12. This challenge does not reveal  
error in the ALJ’s reasoning, however: the ALJ agreed that Plaintiff did not engage in substantial  
gainful activity during the adjudicated period (AR 17) and instead focused on the inconsistency  
between the Plaintiff’s job activities (operating a hauling business and working as a rideshare  
driver) with his alleged mental symptoms. *See* AR 19-20, 23. Even if Plaintiff’s work did not

1 rise to the level of substantial gainful activity, his work activities nonetheless demonstrate that  
2 Plaintiff retains sufficient memory and concentration to drive, that he can tolerate social  
3 interaction with the public, and can follow instructions and complete tasks. *See id.* Plaintiff has  
4 not shown that the ALJ erred in finding that Plaintiff's work activities were inconsistent with his  
5 allegations of disabling mental limitations. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007)  
6 (activities may undermine credibility where they (1) contradict the claimant's testimony or (2)  
7 "meet the threshold for transferable work skills").

8 With respect to Plaintiff's lack of mental health treatment, Plaintiff emphasizes that he  
9 was diagnosed in November 2016 as well as January 2019 with PTSD and depression. Dkt. 11  
10 at 12-13 (citing AR 733, 1338-47). Plaintiff argues that the ALJ did not identify what treatment  
11 would have been helpful for those conditions. *Id.* Plaintiff misses the ALJ's point: the ALJ is  
12 not a psychologist and was not obligated to form treatment recommendations, and Plaintiff does  
13 not dispute that he did not receive any mental health treatment during the period although  
14 treatment was recommended. *See, e.g.*, AR 1346. Furthermore, Plaintiff does not dispute that,  
15 as the ALJ found, he denied mental health symptoms and his providers noted normal mental  
16 functioning during the period. *See* AR 23 (citing AR 310, 725-26, 1487). On this record, the  
17 ALJ did not err in finding that Plaintiff's unexplained lack of treatment for his diagnosed  
18 conditions undermines his allegation that those conditions are disabling. *See Molina*, 674 F.3d at  
19 1113-14. Although Plaintiff emphasizes that traumatic events gave rise to his PTSD (Dkt. 11 at  
20 13), nothing in the ALJ's decision suggests that he disbelieved Plaintiff's diagnosis or the  
21 underlying trauma. The ALJ included PTSD as a severe impairment at step two and indicated  
22 that Plaintiff's mental conditions suggested that he was limited in his ability to work at a  
23 production pace. AR 18, 23.

1 Plaintiff also argues that the ALJ erred in finding that the connection between Plaintiff's  
2 mental distress and physical pain undermined the severity of his limitations. Dkt. 11 at 12. The  
3 Court agrees that this line of the ALJ's reasoning is not convincing, but this error is harmless in  
4 light of the multiple other valid reasons the ALJ provided for discounting Plaintiff's allegations.

5 See *Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008).

6 Because Plaintiff has not shown that the ALJ harmfully erred in discounting his mental  
7 allegations, the Court affirms this portion of the ALJ's decision.

8       **B. The ALJ Erred in Assessing Medical Opinions**

9 Plaintiff challenges the ALJ's assessment of opinions written by Robin Ferguson, Ph.D.,  
10 and James Hopfenbeck, M.D., and argues that the ALJ erred in failing to address an examination  
11 report written by Gregory Nicholson, M.D. The Court will address each disputed opinion in  
12 turn.

13           *I. Legal Standards*

14 In assessing Plaintiff's 2018 application for benefits, the ALJ is required to articulate the  
15 persuasiveness of each medical opinion, specifically with respect to whether the opinions are  
16 supported by and consistent with the record. 20 C.F.R. §§ 404.1520c(a)-(c) 416.920c(a)-(c).

17 The Commissioner argues that the regulations promulgated in 2017 changed the legal  
18 standards previously articulated by the U.S. Court of Appeals for the Ninth Circuit. See Dkt. 15  
19 at 8-11. Under current Ninth Circuit precedent, an ALJ must provide "clear and convincing"  
20 reasons to reject an uncontradicted opinion from a treating or examining doctor, and "specific  
21 and legitimate" reasons to reject a contradicted opinion from such doctor. *Lester v. Chater*, 81  
22 F.3d 821, 830–31 (9th Cir. 1995). The Ninth Circuit has not yet addressed the 2017 regulations  
23 in relation to its standards for the review of medical opinions. It is not, in any event, clear that

1 the Court's consideration of the adequacy of an ALJ's reasoning under the new regulations  
 2 would differ in any significant respect. The new regulations still require ALJs to explain their  
 3 reasoning with specific reference to how they considered the supportability and consistency  
 4 factors, 20 C.F.R. §§ 404.1520c(a)-(b), 416.920c(a)-(b), and that reasoning must remain  
 5 legitimate. *See Thomas S. v. Comm'r of Social Sec.*, No. C20-5083 RAJ, 2020 WL 5494904, at  
 6 \*2 (W.D. Wash. Sept. 11, 2020). The Court must, moreover, continue to consider whether the  
 7 ALJ's analysis has the support of substantial evidence. *Ford v. Saul*, 950 F.3d 1141, 1154 (9th  
 8 Cir. 2020). With these regulations and considerations in mind, the Court proceeds to its analysis  
 9 of the medical evidence in this case.

10           2.       *Dr. Ferguson*

11           Dr. Ferguson examined Plaintiff in January 2019 (AR 1060-65) and provided an  
 12 addendum in March 2019 describing Plaintiff's mental RFC:

13           [Plaintiff] needs an occupational setting with a minimum of stress which means  
 14 that routine, simple work is best for him right now. [Plaintiff] is considered fully  
 15 capable of managing funds in his own best interest. [Plaintiff's service-  
 16 connected] mental disorder does not impair the ability to understand and follow  
 17 instructions. [Plaintiff's service-connected] mental disorder does not impair the  
 18 ability to retain instructions or sustain attention in simple tasks, but it may  
 19 contribute to mild impairment in sustaining concentration on complex tasks.  
 [Plaintiff's service-connected] mental disorder may contribute to mild impairment  
 in task persistence and pace. The [service-connected] mental disorder may  
 contribute to mild and moderate impairment in the ability to respond  
 appropriately to coworkers, supervisors, or the general public. [Plaintiff's  
 service-connected] mental disorder may contribute to moderate impairment in  
 ability to respond appropriately to changes in the work setting.

20 AR 1048. The ALJ found Dr. Ferguson's addendum to be partially supported by her January  
 21 2019 examination, but inconsistent with Plaintiff's minimal mental health treatment during the  
 22 period, as well as his work and childcare activities. AR 26. The ALJ specifically found Dr.  
 23 Ferguson's opinion that Plaintiff required simple, routine work to be inconsistent with the

1 evidence that Plaintiff “managed a business.” *Id.* The ALJ also emphasized that Dr. Ferguson  
 2 opined that many of Plaintiff’s symptoms “can be attributed to coping with chronic pain and  
 3 physical limitations resulting from a 2010 motorcycle accident” (AR 1062), and found this  
 4 opinion to be inconsistent with Dr. Ferguson’s opinion as to the severity of Plaintiff’s mental  
 5 limitations. AR 26.

6 Plaintiff argues that the ALJ erred in discounting Dr. Ferguson’s opinion as to his  
 7 restriction to simple, routine work based on his ability to manage his own business, because the  
 8 ALJ’s decision overstates the job responsibilities involved in his prior courier work. Dkt. 11 at  
 9 6-7. Indeed, the Court finds no evidence that Plaintiff’s courier work was akin to management of  
 10 a business. *See* AR 47-49, 217-21, 672. Furthermore, Dr. Ferguson indicated that Plaintiff could  
 11 perform work requiring a “minimum of stress[,]” but did not purport to provide an exhaustive  
 12 definition of that restriction. She found that “right now[,]” Plaintiff would be restricted to  
 13 routine, simple work, but her phrasing contemplates a broader stress-related restriction. The  
 14 Court agrees with Plaintiff that the ALJ’s reason to discount Dr. Ferguson’s simple, routine work  
 15 is not supported by substantial evidence and that the ALJ also read Dr. Ferguson’s opinion in this  
 16 respect in an overly narrow manner.

17 Plaintiff goes on to argue that the ALJ erred in discounting Dr. Ferguson’s opinion based  
 18 on her comment that many of Plaintiff’s symptoms were connected to his coping with chronic  
 19 pain and physical limitations. Dkt. 11 at 7. The Court agrees: the ALJ failed to provide a  
 20 legitimate explanation of how this comment undermines Dr. Ferguson’s opinion regarding  
 21 Plaintiff’s mental limitations.

22 Because the ALJ erred in assessing Dr. Ferguson’s opinion, the ALJ must reconsider this  
 23 opinion on remand. Plaintiff’s argument notwithstanding (Dkt. 16 at 9), Dr. Ferguson’s opinion

1 does not necessarily describe disabling limitations, such that if it were credited it would require a  
 2 finding of disability, and thus the Court finds that further proceedings would serve a useful  
 3 purpose.

4           3.       *Dr. Hopfenbeck*

5           Dr. Hopfenbeck examined Plaintiff in May 2020 and wrote a narrative report and  
 6 completed forms describing Plaintiff's symptoms and limitations. AR 1823-49. Dr. Hopfenbeck  
 7 opined that if Plaintiff attempted to work, his "severe PTSD and depression would [] be a strong  
 8 barrier to being able to maintain focus, relate to others, or otherwise be accommodated." AR  
 9 1830. Dr. Hopfenbeck also indicated that he did "not think [Plaintiff] will be able to secure or  
 10 hold anything close to a full time job in the foreseeable future[.]" *Id.*

11          The ALJ found Dr. Hopfenbeck's opinion unpersuasive because it was not supported by  
 12 or consistent with the longitudinal evidence or Dr. Hopfenbeck's objective findings. AR 26.  
 13 Specifically, the ALJ found that Dr. Hopfenbeck's objective testing was mostly normal, and that  
 14 the restrictions Dr. Hopfenbeck described appear to be based on Plaintiff's subjective reporting  
 15 rather than clinical findings. *Id.* The ALJ also found Dr. Hopfenbeck's opinion that Plaintiff  
 16 was unable to work at the time of his amended alleged onset date to be inconsistent with  
 17 Plaintiff's minimal mental health treatment during the adjudicated period as well as his denials of  
 18 mental complaints during the period. *Id.*

19          Plaintiff contends that Dr. Hopfenbeck did not unduly rely on subjective reporting. Dkt.  
 20 11 at 10-11. Even if Plaintiff is correct on this point, any error is harmless because the ALJ  
 21 provided other valid reasons to find Dr. Hopfenbeck's opinion unpersuasive, namely Plaintiff's  
 22 lack of mental health treatment during the period and Plaintiff's denial of symptoms during the  
 23 period. AR 26. As described *supra*, substantial evidence supports these findings, and the ALJ

1 did not err in finding that the scant evidence of mental complaints and treatment during the  
2 adjudicated period undermined Dr. Hopfenbeck's opinion as to the extent of Plaintiff's  
3 limitations during the adjudicated period. *See Flaten v. Sec. of Health & Human Servs.*, 44 F.3d  
4 1453, 1464 (9th Cir. 1995) (finding that in assessing medical opinions an ALJ may properly  
5 consider the level or frequency of treatment for allegedly disabling conditions over the course of  
6 a claimant's history of medical care).

7                  4.        *Dr. Nicholson*

8                  In October 2016, Dr. Nicholson examined Plaintiff and completed a form the following  
9 month describing Plaintiff's psychological diagnoses and symptoms. AR 1338-47. Dr.  
10 Nicholson indicated that, *inter alia*, Plaintiff's impairments would result in "occasional decrease  
11 in work efficiency and intermittent periods of inability to perform occupational tasks, although  
12 [he is] generally functioning satisfactorily, with normal routine behavior, self-care and  
13 conversation[.]" AR 1339.

14                  The ALJ did not assess Dr. Nicholson's opinion in the decision, and Plaintiff argues that  
15 the ALJ erred in failing to do so. Dkt. 11 at 8-9. Because this case must be remanded for the  
16 ALJ to reconsider Dr. Ferguson's opinion, the ALJ will have the opportunity to explicitly discuss  
17 Dr. Nicholson's opinion for the first time on remand.

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## CONCLUSION

The Commissioner's final decision is **REVERSED** and this case is **REMANDED** for further administrative proceedings. On remand, the ALJ shall reconsider the opinions of Drs. Ferguson and Nicholson and either credit them or provide legally sufficient reasons to discount them. The ALJ may also reconsider any other part of the decision as necessary.

Dated this 26th day of July, 2021.

Skate Vaughan

S. KATE VAUGHAN  
United States Magistrate Judge